

BY WAR...
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 C. W. BILL YOUNG, FLA.

THOMAS K. LATIMER, STAFF DIRECTOR
 MICHAEL J. O'NEIL, CHIEF COUNSEL


U.S. HOUSE OF REPRESENTATIVES
PERMANENT SELECT COMMITTEE
ON INTELLIGENCE
WASHINGTON, D.C. 20515

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December 18, 1980

MEMORANDUM FOR PATRICK G. LONG

FROM: Ira H. Goldman, Counsel 

SUBJECT: FOIA and Executive Order 12065

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The Freedom of Information Act (FOIA), 5 U.S.C. Section 552, has been severely criticized over the past few years for having a seriously detrimental impact on the both the resources and activities of the agencies comprising the intelligence community (IC). The complaints specifically point to the amount of money spent processing FOIA requests, the number of hours intelligence officers and analysts much divert from their regular duties to respond to FOIA requests, and the reluctance of individuals to provide information to the IC (particularly the CIA and the FBI) because they feel that their identities cannot be fully protected from disclosure pursuant to FOIA. While attention has focused on possible legislative remedies to the current situation, a much more direct and almost as effective cure can be had through a modification of the Executive Order on national security classification, E.O. 12065.

Background

Enacted in 1966, FOIA generally provides that information maintained in government files shall be disclosed to individuals upon request. Recognizing that openness in government is not an absolute proposition, certain types of information are explicitly exempted from disclosure. Subsection (b) of the Act contains nine exemptions, and it is paragraphs (b)(1) and (b)(3) which are most often relied upon by the IC in refusing to release information requested pursuant to FOIA. Paragraph (b)(3) states that FOIA does not apply to matters that are "specifically exempted from disclosure by statute", thereby providing protection for most NSA information under 18 U.S.C. Section 798 (regarding signals intelligence and cryptographic information) and some CIA information under the National Security Act of 1947 provision granting the DCI responsibility for protecting "intelligence sources and methods". However, it is exemption (b)(1) around which much of the current controversy revolves.

Originally, (b)(1) protected information --

(1) specifically required by Executive order to be kept secret in the interest of national defense or foreign policy.

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Under this standard, if a lawsuit were filed seeking mandated disclosure, the government was only required to show that an authorized official had designated the information as classified. No showing was required to prove that the information had been properly designated as classified pursuant to Executive Order. This all changed in 1974.

Current Status

In the immediate wake of Watergate, the 93rd Congress amended FOIA -- over the veto of President Ford -- greatly increasing its effect on intelligence information. The courts were encouraged to make an independent, de novo review of an agency decision to withhold information. More importantly, paragraph (b)(3) was also amended so as to only exempt from disclosure matters that are --

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and, (B) are in fact properly classified pursuant to such Executive order.

Thus began the process whereby courts review the actual documents which are being sought under FOIA to determine if they at least meet the standard for classification at the "Confidential" level -- information "the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security".

This creates great problems. Because the burden is on the agencies to prove exemption from FOIA, significant resources must be diverted to put together a good defense so as to prevent a court from ordering disclosure. And, by giving the court an independent role in assessing possible harm to the national security, confidential intelligence sources cannot be given adequate assurances that their identities will be protected from official public disclosure. However, problems only remain significant if the Executive Order on classification retains its current structure.

Proposed Remedy

Because exemption (b)(1) requires reference to an Executive Order on classification in deciding what information relating to national security is subject to release, it is apparent that the Congress has effectively delegated to the President the authority to place intelligence related materials either within or without the scope of FOIA. This becomes even more evident when read in the light of the legislative history of the Act which indicates that the Congress intended through FOIA that the Executive Branch merely adhere strictly to its own rules on classification -- whatever they may be -- and nothing more. Therefore, with appropriate drafting, a new Executive Order on classification could obviate much of the impact of FOIA. By simply redefining the criteria by which the Executive Branch agencies determine what information must be "kept secret in the interest of national

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defense or foreign policy", with a single stroke of a pen the President can protect from FOIA any or all foreign intelligence information collected and maintained by any or all of the agencies in the intelligence community.

A model for how this change in the Executive Order might be accomplished can be found in the existing Executive Order 12065:

1-303. Unauthorized disclosure of foreign government information or the identity of a confidential foreign source is presumed to cause at least identifiable damage to the national security.*

Section 1-303 was designed to prevent a court from second guessing an intelligence agency official with regard to two types of information, for they are "presumed" to be properly classified. By changing the word "presumed" to "conclusively presumed",** and by otherwise modifying the categories as listed in 1-303, a great improvement can be achieved. For example, 1-303 could be changed to read as follows:

1-303. Unauthorized disclosure of information contained in the files of the Central Intelligence Agency, the National Security Agency, and in the foreign intelligence and counterintelligence files of the Federal Bureau of Investigation is conclusively presumed to cause at least identifiable damage to the national security.

While this example encompasses the broadest approach which might be taken as to CIA, NSA, and FBI, this proposal could be expanded to cover more agencies (e.g., DOD, DOE) and/or could be narrowed to cover only specific types of information within the files of the IC. For instance, during the debate on intelligence charter legislation in the 96th Congress, the CIA proposed that information be exempted from FOIA if contained in a file designated by the DCI to be concerned with one of the following categories:

- (a) The design, function, deployment, exploitation, or utilization of scientific or technical systems for the collection of intelligence;
- (b) special activities and intelligence operations;

*As noted above, the "identifiable damage to the national security" standard is used in classifying a matter "Confidential". Therefore, 1-303 serves to indicate that the specified information is "presumed" to be properly classified at least at the "Confidential" level.

**In one case currently pending on appeal, a federal district court judge in Washington held that the presumption could be, and, in that case, had been overcome. Adding the word "conclusively" should solve this problem.

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(c) investigations conducted to determine the suitability of potential intelligence sources;

(d) intelligence and security liaison arrangements or information exchanges with foreign governments or their intelligence or security services.

Should changes be made as suggested, the affected agencies would respond to an FOIA request only be searching its files which were not newly "exempted". For, even if information were found in the "exempted" files, court review of it could serve no purpose because it would be "conclusively presumed" to be properly classified.

Of course, this change by Executive fiat could well raise a storm of protest from the press and others. Also, it must be remembered that what can be changed by one President through the issuance of an Executive Order can be re-changed by a later President through the same process. Therefore, remedial legislation should also be considered as a more appropriate final solution.

Post Script

Executive Order 12065 contains a so-called balancing test. Section 3-303 requires that information must be disclosed if it is determined that "the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure". Assuming the correctness of this approach for internal Executive Branch purposes, it seems clearly inadvisable for such a balancing test to be applied by a court performing a de novo review pursuant to FOIA. In all but an exceptional case, it would be an inappropriate usurpation of the President's prerogatives for a court to hold that the public interest in some information outweighed the harm resulting from release. Some judges have recognized this, but not all. Therefore, a new Executive Order should either clarify this point, abolish the balancing test, or simply remove it from the Executive Order, itself, and place it in separate guidelines.